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No. 322.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

NORTH CAROLINA RAILROAD COMPANY,
Petitioner,

vs.

STORY, SHERIFF, AND KING, ADMINISTRATOR,
Respondents.

BRIEF OF RESPONDENTS.

W. P. BYNUM,
R. C. STRUDWICK,
Counsel for Respondents.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1923

PETITION FOR WRIT OF CERTIORARI.

North Carolina Railroad Company, Petitioner,

vs.

C. D. Story, Sheriff of Alamance County, and P. M. King, Administrator, Respondents.

BRIEF OF RESPONDENTS.

STATEMENT OF FACTS.

The original action of P. M. King, administrator of Maggie Barber, against the North Carolina Railroad, was begun March 9, 1920, and judgment in his favor was rendered in the Superior Court of Guilford County, North Carolina, on March 21, 1921. The action was for a tort, the negligent killing of his intestate, Maggie Barber, on February 28, 1920.

In its answer to the complaint therein defendant denied the alleged negligence, and it further alleged that it was, at the time of the occurrence, being operated by the Director General of Railroads under Federal authority. It claimed immunity to suit in that action under the Federal Control Act and the administrative orders issued pursuant thereto. It did not set up the provisions of the Transportation Act, nor claim immunity thereunder, though that act was in full force and effect, having been passed February 28, 1920, nor did it plead any provision of the Constitution of the United States.

Upon the trial at March Term, 1921, the jury rendered a verdict in favor of plaintiff for $2,500, and a judgment was rendered accordingly. No appeal to the Supreme Court was ever perfected from this judgment.

On February 8, 1922, it stood unpaid, unreversed, in full force and effect.

On that day King, the administrator, brought an action upon the judgment. He alleged only that the judgment had been rendered; that it was in full force and effect, and was unpaid. In its answer to this second action, petitioner did not deny the rendition of the judgment, and that it was unpaid, but alleged that the judgment rendered against it at March Term, 1921 (the judgment upon which the action was brought), was not "legal or binding"; it also pleaded the same immunity under the Federal Control Act which it had pleaded in the first action, and for the first time set up the provisions of the Transportation Act as a bar to the action.

The Superior Court sustained a demurrer to this action and gave judgment for plaintiff. From this judgment petitioner appealed to the Supreme Court of North Carolina, which, on November 29, 1922, affirmed the judgment of the Superior Court (184 N. C., 442). It decided that the first judgment, though it might have been erroneous, not having been appealed from, was in full force and effect, and concluded the defendant as to all such matters as were set up in defense therein and decided against it in that action; that being a valid judgment, in full force and effect and unpaid, King, the administrator, had a right to bring an action upon it, and that the judgment in said second action was a valid one. It further held, as to the Transportation Act set up by the defendant for the first time in its answer in the second action, that its provisions did not apply to prevent plaintiff from levying an execution upon this second judgment.

When this judgment was certified to the Superior Court, it, on March 30, 1923, entered judgment directing "that execution

of said judgment do proceed." There was no attempt by petitioner to have either of these two judgments reviewed by this Court.

Thereafter execution was issued upon said judgment, and was levied by respondent Story, sheriff of Alamance County, upon certain property of petitioner. On May 5, 1923, the present action was begun to enjoin King, the administrator, and Story, sheriff, from proceeding under said execution to sell petitioner's property to satisfy the same. It is called a bill in equity, and the relief sought is permanently to enjoin the plaintiff in the execution, P. M. King, administrator, from enforcing it by due process of law. The judge of the Superior Court, before whom the restraining order was made returnable, made an order dissolving the same, and upon appeal by petitioner to the Supreme Court, that order was, on February 21, 1924, affirmed.

Petitioner's application is for a writ of *certiorari* to review said last decision on the ground that it has deprived petitioner of a right, privilege or immunity guaranteed to it under section 206 (9) of the Transportation Act of February 28, 1920.

ARGUMENT.

(1) Petitioner says that it is not barred from having this question now considered, although it made no move to have the decision and judgment of the Supreme Court of North Carolina (rendered November 29, 1922) reviewed by this Court. The record shows that such decision and judgment were rendered in an action wherein the petitioner set up in its answer the provisions of the Transportation Act as a bar to respondent's right to maintain the action or to issue or to levy execution upon the judgment obtained therein. The Court (184 N. C., 442) finally decided both these questions against it, and petitioner in its present petition (page 14) admits this, saying, "The Supreme Court of North Carolina in its opinion, found in 184 N. C., 442, erred and deprived petitioner of its rights, privileges and immunities set up and found in section 206 (9) of the act of

Congress known as the Transportation Act, in holding that said section of the said act of Congress was not intended to apply to judgments such as the one obtained against your petitioner." If so, why, then, did it not apply to have it reviewed here?

Having failed to apply for a writ of *certiorari* to review this judgment within the time limited by law, petitioner cannot avoid the effect of its failure by an independent suit in the nature of a bill of equity, to restrain the execution of said judgment, which bill was filed after the three months had expired. This is an attempt to do indirectly what the statute forbids to be done directly, and one which this Court has declared must fail. *Rooker v. Fidelity Trust Co.*, decided December 10, 1923.

It is contended by petitioner that the Transportation Act refers to the *levying* of an execution, and not to the issuing of it. This would seem to be an untenable position. If a court decides that an execution on a judgment may rightfully be issued, it thereby necessarily decides that it may rightfully be levied. Besides, the Supreme Court of North Carolina did expressly decide that the execution might be both issued and levied, when it held that the Transportation Act did not apply to the judgment in question, or in any manner protect the petitioner from execution on the judgment. The effect of the affirmance of the judgment, to the obtaining of which petitioner set up the Transportation Act as a bar, was to declare that it might be enforced by the ordinary process of law, even if no express reference had been made to the Transportation Act. *Gordon v. U. S.*, 117 U. S., 702. This was a final judgment upon the same Federal question now attempted to be presented, and petitioner's right to move to have it reviewed accrued then (November 29, 1922). *North Carolina R. R. v. Zackery*, 232 U. S., 248. Cases are cited in petitioner's brief to the effect that certain judgments therein referred to were not final in the sense that they might be reviewed by writ of error or *certiorari*. But it would seem not to admit of a doubt that this judgment was a final one, to all intents and purposes. It finally adjudicated all the questions

presented, including the force and effect of the Transportation Act, upon the merits; affirmed the right of plaintiff therein to recover a definite sum of money from petitioner, and not only so, but it expressly decided that this judgment might be enforced by execution notwithstanding the provisions of the Transportation Act. There was nothing further to be done by that Court, nothing left undecided which might call for further action on its part.

This was a final judgment as defined by this Court. *Mower v. Fletcher*, 114 U. S., 128. It further appears from the record that when this judgment was certified down to the Supreme Court of Guilford County, that Court, on March 30, 1923, entered judgment thereon, expressly directing that "execution thereof do proceed." There was no appeal from this judgment by petitioner, nor does it refer to it in its brief, although the Supreme Court, in the opinion in this case, refers to it as one of the judgments by which the petitioner is concluded.

It is difficult to see why it is not bound by it, in the same manner, as it would be bound by any other judgment by a court of competent jurisdiction, made in an action to which it was a party. It thus appears that here are two judgments of the courts of North Carolina, one rendered November 29, 1922, and the other rendered March 30, 1923, expressly denying to petitioner the immunity it again attempts to claim. Petitioner took no steps to have either of them reviewed, and by its own delay and laches, it has let the time elapse within which it is allowed by the statute to have them reviewed here.

Petitioner contends, however, that a *certiorari* ought to be granted him to review the decision of the Supreme Court of North Carolina rendered in the present action on February 21, 1924.

Respondent submits that this application should not be allowed:

(1) Because it decides no Federal question, nor was the decision of any Federal question necessary to the conclusion an-

nounced therein. The petitioner in its petition (page 15) incorrectly states that it was held and decided therein "that the inhibition against the levying of an execution on the judgment was not intended to protect the carrier from judgments in independent suits in which the carrier had failed to interpose its proper defenses, and therefore the judgment denying the injunction was affirmed." A reading of the opinion will show that the language here referred to was quoted by the Court from its former decision as one of the reasons why petitioner was concluded thereby. This being so, the assertion in petitioner's brief would seem to be unsupported by the record, inaccurate, and misleading. That Court did decide, and we submit it decided nothing else, that petitioner was concluded by the two judgments referred to in the opinion, which it had made no attempt to appeal from or to have reviewed in any manner. It says "it would seem that appellant (petitioner) having lost its right to review the judgments against it, is endeavoring to obtain a rehearing of the case by means of a second suit, a couse condemned under our decisions applicable. *Hospital v. R. R.*, 157 N. C., 460, and cases cited." Petitioner says in its petition (page 15): "The Supreme Court of North Carolina, in its opinion rendered February 21, 1924, deprived your petitioner of the right, privilege and immunity set up and claimed by it, and found in section 206 (g), Transportation Act, 1920, in holding that your petitioner was concluded on the question of liability by the two judgments, which were unchallenged, and that its application for an injunction against execution had been properly refused." The holding by that Court that petitioner was barred from obtaining therein the relief it sought, because it was barred or concluded by the two former judgments, unappealed from, presents no Federal question. In *San Francisco v. Itsell,* 133 U. S., 65, it is said: "This Court has no jurisdiction to review a judgment of the highest court of a State, unless a Federal question has been, either in express terms or by necessary effect, decided by that Court against the plaintiff in error. Rev. Stat., sec. 709 (cases cited).

"In the present case, the record of the pleadings, findings of fact and judgment shows that it was unnecessary for that Court to decide, and its opinion filed in the case and copied in the record shows that it did not decide, and question against the plaintiff in error, except the issue whether the former judgment rendered against it and in favor of the grantor of the defendants in error was a bar to this action. That was a question of general law only, in nowise depending upon the Constitution, treaties, or statutes of the United States. *Chouteau v. Gibson,* 111 U. S., 200."

King v. West Virginia, 216 U. S., 101.
Delmas Case, 210 U. S., 335.

The record shows that the facts alleged in the complaint in this action are the same as those set out in the answer of petitioner to the action brought by the administrator upon the first judgment (184 N. C., 442); that it set up and relied upon that same section of the Transportation Act, thereby inviting and obtaining an adjudication of the question as to its immunity from execution under said act, which it now attempts to claim. The parties are the same (the joinder of the sheriff is mere surplusage, as was admitted by petitioner in its brief filed in the Supreme Court of North Carolina). If the question were an open one here, it would seem that the decision of the State Court that, upon the record, it was concluded in this action by the two former judgments and decision was right; but as has been stated, this Court has repeatedly held this is not a Federal question. If by successive suits a party claiming to be aggrieved could constantly renew its right to have final judgments of state courts reviewed here, then the statutory provision that such right must be exercised within three months after the decision complained of would be rendered nugatory.

In so far as the principle announced in *People v. Atwell,* 261 U. S., 590, has any application, it would seem that it furnishes another ground for denying a writ of *certiorari* in this case.

The decision of the Supreme Court to the effect that petitioner was concluded by the two former judgments of the State Courts was a decision upon an independent ground not involving a Federal question, and was broad enough to sustain the decision complained of. If such a case, it is declared in *Atwell's case,* this Court will not disturb the decision of the State Court.

(1) and (2). Petitioner, in its brief, contends secondly and thirdly that the cause of action, on account of which this judgment was obtained in the second action, grew out of the possession, use and control and operation of the railroad by the President, under Federal control.

Petitioner is here referring to the action brought upon the first judgment (184 N. C., 442). As to the first judgment, that of March, 1921, it says in its brief (page 33): "Petitioner is not seeking to go behind the first judgment and have the error corrected." It thereby admits its validity. The record shows that the judgment complained of (184 N. C., 442) was rendered by the Supreme Court of North Carolina, November 29, 1922, and that no application to review it has ever been made until the present action was instituted on May 5, 1923. This being the case, the judgment has by lapse of time become final so far as a review by this Court is concerned, and it would not seem to be material to inquire out of what the cause of action upon which it was based arose. But in order that petitioner's position on this point may not pass unchallenged (for we submit it is not the law), respondents say that the cause of action there was the nonpayment of the original judgment, and was not at all the cause of action upon which that original judgment was founded. The original judgment was *ex delicto,* for a tort, the action upon it was *ex contractu,* upon the promise, conclusively implied by law, on the part of every judgment debtor, that he will pay and satisfy the demand which the law has declared that he owes. This is a new cause of action, distinct and separate from the original one. 3 Bl. Comm., 160. It has been

held that an action upon a judgment for slander was an action *ex contractu,* the original cause of action being merged in the judgment. So (except for purposes of a lien) it has been held in North Carolina. *Moors v. Newell,* 94 N. C., 270; *McDonald v. Dixon,* 87 N. C., 407. Other well-considered cases are to the same effect:

Carr v. Roscher, 119 N. Y., 535.
Johnson v. Butler, 2 Iowa, 535.
Dawson v. Harmons, 65 Minn., 402.
Mobile Bank v. Mobile R. R., 69 Ala., 305.
Andrews v. Varrell, 46 N. H., 17.
Byrd v. Creed, 65 Ohio, 46.

This Court, upon this point, has said: "If there be any one principle of law settled beyond all questions, it is this, that whensoever a cause of action, in the language of the law *transit in rem judicatam,* and the judgment thereon remains in full force unreversed, the original cause of action is merged and gone forever." *U. S. v. Loeffler,* 11 Peters, 86 (101).

The question presented upon this record is not, as petitioner insists, whether, under the provisions of the Transportation Act, an execution upon such a judgment as that passed upon in 184 N. C., 442, can be rightfully issued and levied upon petitioners property; not whether the decision of the Supreme Court of North Carolina that this could be done and denying to the petitioner the immunity from such execution it then claimed was erroneous, but whether or not, after petitioner by laches and delay, has permitted the time elapse within which it might have applied to have that decision reviewed, it can now, by an independent suit, obtain a review of that decision which it should have applied for within three months after its rendition.

The statement of petitioner in its brief (page 26) with regard to the answer of respondent, is not correct, as a reference to the record will show (Petition, p. 13). It is said in the brief

(page 28): "It is advisable to look to the first decision (that of November 29, 1922), because the second (February 21, 1924) therefrom is *based thereon.*" An examination of the two opinions will show the inaccuracy of the last statement. The last opinion does quote from the first, but only to show what it had decided in that first opinion, as a reason for holding, as it did, in the last opinion that petitioner was concluded by the former decision.

Something is said in the brief (page 28) of the equitable jurisdiction residing in courts to enjoin the execution of a judgment obtained by *fraud.* This is purely gratuitous. There is no allegation of fraud, or even mistake, made in any pleading in this record, nor is any reference to fraud made in any opinion or decision appearing therein.

It is respectfully submitted that the application for a writ of *certiorari* should be denied.

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